

1 LUKE A. BUSBY, ESQ  
2 Nevada Bar No. 10319  
3 316 California Ave.  
4 Reno, Nevada 89509  
5 775-453-0112  
6 luke@lukeandrewbusbyltd.com

7 *Attorney for the Plaintiff*

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 \*\*\*

11 SHANNON CARTER,  
12 Plaintiff,  
13 vs.  
14 S. BEAN and DR. BITAR, *et al.*,  
15 Defendants.  
16 \_\_\_\_\_/

17 Case No.: 2:17-cv-01628-RFB-EJY  
18 Appeal No. 20-17442

19 **MEMORANDUM OF POINTS AND  
20 AUTHORITIES IN SUPPORT OF  
21 PLAINTIFF'S PETITION TO  
22 CERTIFY DEFENDANTS' APPEAL  
23 AS FRIVOLOUS AND REQUEST  
24 TO PROCEED WITH TRIAL**

25 COMES NOW, SHANNON CARTER ("Carter" or "Plaintiff"), by and through the  
26 undersigned counsel, and hereby petitions this Court to certify appeal filed by S. BEAN and DR.  
27 BITAR, *et al.* ("Defendants") in this matter as frivolous and requests that this matter proceed to  
28 trial.

29 This Petition is made and based upon all the pleadings and records on file for this  
30 proceeding together with every exhibit that is mentioned herein or attached hereto, if any there  
31 be, as well as the points and authorities set forth directly hereinafter.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## Background

The Court issued its order denying the Plaintiff's motion and granting in part Defendants' motion for summary judgment on November 30, 2020 at ECF #89. On December 14, 2020, the Defendants filed a Motion for Reconsideration [ECF #88], seeking relief under Local Rule 59-1, and this Court denied the same at the hearing conducted on September 28, 2021. *See* ECF # 108.

On December 17, 2020, the Defendants filed a Notice of Appeal (ECF #89) of this matter but noted in the Notice of Appeal that because the Motion for Reconsideration does not address qualified immunity, it may not be a tolling motion under FRAP 4(a)(4).

The Clerk of the Court at the 9<sup>th</sup> Circuit Court of Appeals issued an order on January 7, 2021 holding appellate proceedings in abeyance pending the resolution of the Defendants' Motion.

## **Standard of Review**

The filing of an interlocutory appeal confers jurisdiction on the court of appeals and divests the district court. *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 93 (1st Cir. 2003). “However, Courts have carved out a few narrow exceptions to this rule, such as where the defendant frivolously appeals or takes an interlocutory appeal from a non-appealable order.” *Id.* at 93, citing *United States v. DeFries*, 129 F.3d 1293, 1302-03 (D.C.Cir. 1997). A District Court is not divested of jurisdiction where an interlocutory appeal of qualified immunity ruling is baseless that does not invoke appellate jurisdiction’ even when filed. *Rivera-Torres*, at 94.

Considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources, may serve to limit interlocutory appeals of ‘qualified immunity’ matters to

1 cases presenting issues of law, and not fact. *Johnson v. Jones*, 515 U.S. 304, 305 (1995) (limiting  
 2 the application of *Mitchell v. Forbyth*, 472 U.S. 511 (1985)).  
 3

4 A district court has the authority to certify an appeal as frivolous. *Rivera-Torres*, at 94.  
 5 In *Chuman v. Wright*, 960 F.2d 104 (9th Cir.1992) the Ninth Circuit ruled that: “The evidence in  
 6 the record, viewed in a light most favorable to the party claiming injury, establishes at the very  
 7 least that genuine issues of material fact remain as to whether those clearly established rights  
 8 have in fact been violated,” and that, “[A]n appeal on the issue would do nothing but  
 9 unreasonably delay the time when [plaintiff] gets his day in Court.” *Chuman*, 960 F.2d at 105.  
 10 The Ninth Circuit approved of the type of certification sought here and adopted the rule that:  
 11 “Should the district court find that the defendants’ claim of qualified immunity is frivolous or  
 12 has been waived, the district court may certify, in writing, that defendants have forfeited their  
 13 right to pretrial appeal, and may proceed with trial.” *Id.* In *Bebrens v. Pelletier*, 516 U.S. 299, 310-  
 14 11 (1996), the United States Supreme Court ruled that a district court’s power to certify a  
 15 defendant’s interlocutory appeal of the denial of qualified immunity as frivolous or forfeited  
 16 exists under law.  
 17

18 In the Ninth Circuit, defendants may be sanctioned for filing frivolous appeals that  
 19 include a claim of qualified immunity. *Frunz v. City of Tacoma*, 468 F.3d 1141, 1147 n.10 (9th Cir.  
 20 2006).  
 21

### 22           **The Court’s Order denying Summary Judgment**

23           In its Order denying summary judgment in part at #ECF 87, the Court specifically  
 24 concluded that there were two facts in dispute: (1) What occurred when Mr. Carter was brought  
 25 to his appointment on February 1, 2017, i.e. whether he was denied treatment for his dental  
 26 issues or was refused treatment by the Defendants; and (2) whether Carter had a serious medical  
 27  
 28

1 need that was disregarded by the Defendants. *Id.* at 3-4. The Court concluded that genuine  
 2 issues of material fact exist which could enable a jury to find that the Defendants were  
 3 deliberately indifferent to Plaintiff's medical needs and retaliated against Carter for filing the  
 4 collateral State Court matter. It was on this basis that the Court denied summary judgment.  
 5

6 Further, the Court denied the Defendants qualified immunity on the specific grounds  
 7 that issues of fact remained to be decided. *Id.* at 12 (*citing Sandoval v. Las Vegas Metropolitan Police*  
 8 *Dept.*, 756 F.3d 1154, 1160 (9th Cir. 2014)).  
 9

10           **The Defendants failed to move for summary judgment on the Plaintiff's 14th  
 11 Amendment Due Process claim**

12           In the Screening Order at ECF #44, the Court permitted three claims to proceed against  
 13 the Defendants: (1) an Eighth Amendment deliberate indifference claim against Defendants  
 14 Bean, Bitar, Nash, and Williams; (2) A Fourteenth Amendment Substantive Due Process claim  
 15 against Bean, Bitar, Nash, Williams, Aranas, Buencamino, Stewart, Howell and Dzurenda; and  
 16 (3) a First Amendment retaliation claim against Defendants Bean and Bitar.  
 17

18           However, in Defendant's July 30, 2020 Motion for Summary Judgment (ECF #69), the  
 19 Defendants only moved for judgment on claims 1 and 3 above and failed to move for judgment  
 20 on Mr. Carter's Fourteenth Amendment Substantive Due Process claim. On October 13, 2020,  
 21 Carter filed his Response in Opposition to Defendant's Motion for Summary Judgment (ECF  
 22 #79). On December 20, 2020, the Defendants filed a Supplement (ECF #81) to their Motion  
 23 for Summary Judgment, arguing that Carter is not entitled to summary judgment on his  
 24 Fourteenth Amendment due process claims because his underlying Eighth Amendment  
 25 deliberate indifference to a serious medical condition claims fail as a matter of law. However, per  
 26 an Order from the Court at ECF #68, the deadline to file dispositive motions was set at July 31,  
 27  
 28

1 2020. As such, any argument regarding summary judgment on Mr. Carter's Fourteenth  
 2 Amendment Substantive Due Process claim was due on that date, and Defendant's supplement  
 3 moving for judgment on that claim was untimely by half a year.  
 4

5 **Argument**

6 In the Notice of Appeal filed by the Defendants (ECF# 89), the Defendants claim that  
 7 the Court's Order is appealable under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 526-  
 8 27 (1985), because they appeal the District Court's denial of qualified immunity in denying the  
 9 motion for summary judgment. However, as explained above, a district court's denial of a claim  
 10 of qualified immunity is an appealable final decision under 28 U.S.C. § 1291, "to the extent that  
 11 it turns on an issue of law." *Mitchell*, at 530. Here, the Court's Order, and its denial of summary  
 12 judgment, was unambiguously based on disputed issues of fact. Defendants' appeal based on  
 13 issues of fact rather than an issue of law is unlikely to be successful and likely to be a waste of  
 14 time and appellate resources. Defendants' Notice of Appeal is meritless and warrants a finding  
 15 that it is frivolous.

16 Defendants state that they are appealing the Court's determination that Defendants  
 17 Bean and Bitar are entitled to qualified immunity on the Plaintiff's claims under the First and the  
 18 Eighth Amendments. There is no mention of Carter's Fourteenth Amendment Substantive Due  
 19 Process claim. No Defendant has moved this Court for a stay or requested a continuance. On  
 20 this basis alone, the Court could find that the appeal is frivolous, and order that this matter  
 21 should proceed to trial.

22 Upon the district court taking the affirmative step of certifying an appeal as frivolous, the  
 23 district court retains jurisdiction to proceed to trial. *Rivera-Torres v. Ortiz Velez*, 341 F.3d at 94,  
 24

1 citing *Stewart v. Donges*, 915 F.2d 572, 577-78 (10th Cir. 1990), *Chuman v. Wright*, 960 F.2d at 105,  
2 *Yates v City of Cleveland*, 941 F.2d 444, 449 (6th Cir. 1991).

3           **Conclusion**

4  
5           BASED ON THE FOREGOING, the Plaintiff petitions this Court to certify the appeal  
6 filed by the Defendants in this matter as frivolous and order that this matter proceed to trial.

7  
8           **DATED** this October 9, 2021:

9  
10           By: /s/ Luke Busby, Esq.  
11           LUKE A. BUSBY, ESQ  
12           Nevada Bar No. 10319  
13           316 California Ave.  
14           Reno, Nevada 89509  
15           775-453-0112  
16           [luke@lukeandrewbusbyltd.com](mailto:luke@lukeandrewbusbyltd.com)  
17           *Attorney for the Plaintiffs*

1  
2                   **CERTIFICATE OF SERVICE**  
3

4                   Pursuant to FRCP 5(b), I certify that on the date shown below, I caused service to be  
5 completed of a true and correct copy of the foregoing Document by:  
6

- 7        \_\_\_\_\_ personally delivering;  
8        \_\_\_\_\_ delivery via Reno/Carson Messenger Service;  
9        \_\_\_\_\_ sending via Federal Express (or other overnight delivery service);  
10      \_\_\_\_\_ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,  
11      X        delivery via electronic means (fax, eflex, NEF, etc.) to:  
12

13                   Amy A. Porray (Bar No. 9596)  
14                   Deputy Attorney General  
15                   State of Nevada  
16                   Office of the Attorney General  
17                   555 E. Washington Ave., Ste. 3900  
18                   Las Vegas, Nevada 89101  
19                   (702) 486-3216 (phone)  
20                   (702) 486-3773 (fax)  
21                   Email: [aporrays@ag.nv.gov](mailto:aporrays@ag.nv.gov)  
[CKnight@ag.nv.gov](mailto:CKnight@ag.nv.gov)

22                   **DATED** this October 9, 2021:  
23

24                   By: /s/Luke Busby.  
25